IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.2603 OF 2004

Shri Raja @ Rajesh Rajan Nair,)
Age 27 years, Residing at)
Sion Koliwada, Indira Nagar,)
R.No.B-1-147 GTB Nagar, Antop Hill,)
Mumbai - 400 037.)
(At present detained at Nasik Road)
Central Prison, Nasik.)).. Petitioner

Versus

1. Shri R.S.Sharma,)
Ex-Commissioner of Police,)
Greater Bombay.)

2. The State of Maharashtra,)

3. The Superintendent,)
Nasik Road Central Prison,)
Nasik.)
(The Petitioner is lodged at)
Nasik Road Central Prison at)
Nasik).).. Respondents

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Shri U.N.Tripathi, Advocate for the petitioner.

Shri D.S.Mhaispurkar, APP for the respondents.

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CORAM : R.M.S.KHANDEPARKAR &
P.V.KAKADE, JJ.

DATED : 5th APRIL, 2005.

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J)

1. The petitioner challenges his detention which has been ordered by the respondent No.1 by the order

dated 30th September, 2003 issued in exercise of the powers under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981, hereinafter referred to as "MPDA Act". The detention of the petitioner was ordered with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. The order was executed on 24th August, 2004.

2. Though the impugned order is sought to be challenged on various grounds, it is not necessary to refer to all those grounds and suffice to consider the ground in relation to the non-application of mind to changes in the circumstances with the passage of time from the date of issuance of the order till the date of execution thereof inspite of the fact that there was a gap of nearly one year from the date of issuance of the order of detention and execution thereof.

3. While assailing the impugned order, the learned Advocate for the petitioner submitted that undisputedly the order of detention has been issued on the basis of three grounds, viz. (i) relating to the alleged involvement of the petitioner in criminal offence in respect of which a complaint was registered as c.R.No.166 of 2003. He further submitted that when

the impugned order dated 30th September, 2003 was passed, the petitioner was already on bail in the said C.R.No.166 of 2003, whereas when the said order was executed on 24th August, 2004, the petitioner was already in the judicial custody with effect from 17th August, 2004. Inspite of the said changes in the circumstances, the detaining authority without application of mind, as to whether the detention of the petitioner in terms of the MPDA Act is necessary or not, sought to execute the detention order dated 30th September, 2003 which was issued nearly one year prior to the date of its execution.

4. Relying upon the decisions in the matters of **Binod Singh v. District Magistrate, Dhanbad, Bihar & Ors.,** reported in AIR 1986 SC 2090, **Smt.Shalini Soni v. Union of India & Ors.,** reported in AIR 1981 SC 431, **Salma Rehman Khan v. M.N.Singh & Ors.,** reported in 2001 ALL MR (Cri) 2063, **Nafis Ahmed Ansari v. State of Maharashtra & Ors.,** reported in 2003 ALL MR (Cri) 2131 and of **Shri Mohd.Ayub Alimuddin Shaikh @ Chikana Ayub v. Shri M.N.Singh & Ors.,** reported in 2004 ALL MR (Cri) 1915, the learned Advocate for the petitioner submitted that the law is well settled that failure on the part of the detaining authority to consider the developments subsequent from the date of

issuance of the order of detention till its execution would render detention order to be illegal as the same would disclose non-application of mind by the detaining authority in relation to the detention of a person sought to be detained, and therefore, the petitioner should be ordered to be released forthwith. He further submitted that the affidavit in reply filed by the concerned authorities confirms the fact of non-application of mind by the detaining authority to the said aspect.

5. The learned APP, on the other hand, placing reliance in the decision of the Apex Court in the matter of **T.P.Moideen Koya v. Government of Kerala & Ors.,** reported in 2004 AIR SCW 5364, submitted that merely because the petitioner had surrendered before the learned Magistrate and the order of detention was served upon him while in custody, that itself would not lead to a conclusion about non-application of mind by the detaining authority to the events subsequent to the issuance of the order of detention against the petitioner. He further submitted that the decision in **Moideen Koya's case (supra)** clearly rules that if the detaining authority considers the aspect regarding the need of detention of the detenu under the preventive detention inspite of the fact that the detenu had been

in the custody on account of criminal offences, that itself is sufficient and that it is not necessary to have an independent consideration of the subsequent events even if the detenu is taken in the custody on account of criminal offences subsequent to the issuance of order of detention. The learned APP further submitted that the view taken by the Apex Court in **Binod Singh's case (supra)** stands modified by the decision of the Apex Court in **Moideen Koya's case (supra)**. Further, drawing attention to the affidavit filed by the detaining authority, the learned APP submitted that in any case the fact about the surrender of the detenu in the criminal case was duly considered by the detaining authority, besides that, even though the detenu had surrendered, the bail granted to the detenu was not cancelled by the learned Magistrate.

6. Undoubtedly, the order of detention was issued with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. The grounds in support of the detention order clearly disclose that the detaining authority had taken into consideration the fact that the detenu was granted bail in C.R.No.166 of 2003 and he had availed the said facility on 12th September, 2003. The detaining

authority had also considered that the detenu, having been released on bail and being a criminal, was likely to revert to the similar activities prejudicial to the maintenance of public order in future and that therefore it was necessary to detain him under the MPDA Act. A clear observation in that regard is to be found in the paragraph 6 of the grounds in support of the detention order. Being so, it is apparent that the fact that the detenu was granted bail and he was accordingly released from the custody had not only weighed in the mind of the detaining authority for being subjectively satisfied about the need for issuance of detention order but was one of the basis for the detaining authority to arrive at the conclusion that in order to prevent the detenu from reverting to the similar activities in future, the clamping of detention under the MPDA Act was absolutely necessary. Undisputedly, the order of detention could not be executed till August 23, 2004. In reply to the challenge about non-application of mind on account of non-consideration of the events subsequent to the issuance of the detention order, the detaining authority in its affidavit has stated that after issuance of the Order of Detention, since the detenu was not traceable thereafter inspite of repeated efforts made to serve the Order of Detention,

the Order of Detention could not be executed. Therefore, the proposal was moved on 20th February, 2004 to the State Government for taking action u/s 7(1)(b) of MPDA Act. Inspite of the same the Order of Detention could not be executed upon the detenu. Thereafter the notice was issued against the surety of the detenu i.e. his mother in CR No.6 of 2002 and it is only thereafter the detenu surrendered to the judicial custody. As the detenu himself was absconding, he cannot take advantage of his own wrong. The detenu having surrendered on account of the notice issued against his mother i.e. the surety, there was no impediment for the detenu to furnish a fresh surety and get himself released on bail at any time. The bail granted to the detenu was not cancelled and, therefore, it was not necessary for the Detaining Authority to record his satisfaction again as to whether the Order of Detention need to be executed or not.

7. One thing is very clear from the explanation furnished by the detaining authority that there was no record regarding satisfaction of the detaining authority about the need of execution of the detention order in August, 2004, that is to say, after surrender of the detenu consequent to the notice issued to his

surety. The fact that the detenu could have availed bail by furnishing some other surety was considered by the detaining authority for the first time while preparing the affidavit in reply to the writ petition filed by the detenu. The said fact was not considered at any time before the actual execution of the order of detention. At the same time, the order of detention was undisputedly issued because the detenu was already released on bail, and therefore, he was a free person and by remaining at large and being a criminal, he was likely to revert to the activities prejudicial to the maintenance of public order. In the background of these facts on record, the rival contentions are to be considered as also the applicability of the judicial pronouncement sought to be relied upon.

8. In **Binod Singh's case (supra)**, it was held by the Apex Court that the power to impose preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. It was specifically ruled that there must be awareness of the facts necessitating preventive custody of a person for

social defence. If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration, by the detaining authority properly and seriously before the service of the order.

9. The Apex Court in **Smt.Shalini Soni's case (supra)** held that "since all the constitutional protection that a detenu can claim is the little that is afforded by the procedural safeguards prescribed by Art.22(5) read with Art.19, the Courts have a duty to rigidly insist that preventive detention procedures be fair and strictly observed. A breach of the procedural imperative must lead to the release of the detenu."

10. In **T.P.Moideen Koya's case (supra),** the Apex Court, after taking into consideration the various decisions including the decision in **Binod Singh's case (supra)**, ruled that "the principle is that if a person

is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent material because the authority passing the detention order for inferring that the detenu was likely to be released on bail." With these observations, the law laid down in **Kamarunnissa v. union of India,** (AIR 1991 (SC) 1640) was also reiterated by reproducing the ruling therein to the effect that "even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity, and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a higher Court." The Apex Court further referring to the facts in **Moideen Koya’s case (supra)**

held that the detenu therein had found a device for surrendering and therefore along with a surety appeared in the Court of ACJM where the surety withdrew his consent and the detenu was remanded in custody till 17the September, 2002. In those facts, it was observed that "a detention order which has been validly passed cannot be rendered invalid on account of the own conduct of the detenu of absconding and evading service. That apart, the ACJM had passed the order of remand only till 17-9-2002 and thereafter there was possibility of his being released or at any rate the petitioner could furnish another surety in place of one who had withdrawn his consent and thereafter he would have been released from custody. The bail granted to the petitioner in the case under Customs Act had not been cancelled. This is not a case where the petitioner may have been taken into custody in connection with some serious criminal case where there may be no immediate possibility of his getting bail." Obviously, in **Moideen Koya's case (supra)**, undoubtedly, there was surrender of the detenu consequent to the withdrawal of the consent of the surety and he was remanded to custody till a specific date. Being so, the detenu could have availed the bail by furnishing fresh surety. In addition, there was already bail granted to him in

customs cases. Besides, he was not involved in any serious criminal case so as to cause any impediment for him to obtain the bail. Bearing in mind those factors, the Apex Court had held that the detention order was not invalid nor it was rendered invalid. That was not a case where the detaining authority had absolutely failed to consider the effect of the events subsequent to the passing of the detention order. On the contrary, the observations made by the Apex Court in the paragraph 22 of the decision, obviously, disclose certain facts which were taken into consideration by the detaining authority, and those facts had occurred subsequent to the issuance of the detention order. In the case in hand, as already observed above, the affidavit in reply filed by the detaining authority discloses that after issuance of the detention order and before execution thereof, the detaining authority nowhere considered the effect of lapse of time and the effect of the events which had occurred subsequent to the passing of the order of detention. All those facts were considered for the first time only after filing of the petition. In fact, to a specific query to the learned APP to point out the contemporaneous records in relation to the statement made by the detaining authority in its affidavit-in-reply pertaining to the events subsequent

to the issuance of the detention order, the learned APP fairly conceded that no such records are available. This apparently discloses that the petitioner is justified in contending that the detaining authority did not apply its mind to the effect of lapse of time as well as to the events which had occurred subsequent to the issuance of detention order till the date of execution of the detention order, inspite of the fact that nearly one year had elapsed from the date of issuance of the order of detention till the execution thereof, and the petitioner had been already in custody on the date of execution of the order of detention.

11. As rightly submitted by the learned Advocate for the petitioner, the Apex Court in no uncertain terms had observed as long back as in 1980 in **Shalini Soni's case (supra)**, the rigid compliance of the procedure prescribed for detention of a person in exercise of the powers under the law relating to preventive detention is expected and to be insisted upon. It is well settled law that for the purposes of detention of a person, it is absolutely necessary for the detaining authority to be subjectively satisfied about the necessity of issuance of such orders against the concerned person. Once it is shown that there was

considerable lapse of time from the date of issuance of the order of detention till the date of its execution coupled with the changes in the circumstances relevant for the enforcement of such powers, certainly it is obligatory for the detaining authority to comply with the necessary procedure with all strictness which it requires and deserves. In the case in hand, it is apparent that even though the order of detention was essentially issued on account of the petitioner being on bail, and therefore, he is a free person, yet such an order of detention was executed nearly one year after the issuance of the order of detention while the petitioner was in custody without considering as to whether in the changed circumstances, the execution of such order was at all necessary, at that stage. This clearly justifies the contention of the petitioner that the detention of the petitioner being without application of mind was illegal, and therefore, he will be entitled for forthwith release from the detention.

12. Before we part with the matter, it is necessary to deal with the aspect regarding the affidavit filed by one of the authorities in reply to the petition. Drawing attention to the paragraph 4 of the affidavit filed by Shri Satish Narayan Pawaskar,

Under Secretary, Home Department (Special), Government of Maharashtra, Mantralaya, Mumbai, it was submitted by the learned Advocate for the petitioner that the contents thereof disclose that the report in terms of the provisions of law comprised under Section 3(3) of the MPDA Act was received from the detaining authority to the Government on 1st October, 2004 and the approval was granted by the Government on 10th October, 2004. Referring to the same, it was also sought to be contended that in view of the said clear admission by the sponsoring authority that the report regarding the order of detention was made beyond the period of 12 days from the date of making of the order, the order itself is liable to be quashed and set aside, and on that count, the petitioner is entitled for being released from the detention. However, it is not necessary to consider this contention in view of the fact that we have already held that the petitioner is entitled to be released forthwith for the reasons mentioned above. However, in reply to this argument, the learned APP has submitted that there was a mistake in typing the date in the said paragraph 4 of the sponsoring authority and instead of typing the year of 2003, it was typed as the year of 2004 in relation to the date of receipt of the report under Section 3(3) of the MPDA Act as

well as in relation to the date of approval order issued by the Government and in that regard, attention was drawn to the affidavit of the detaining authority Shri A.N.Roy, Commissioner of Police, Brihan Mumbai, and in particular to paragraph 5 thereof, wherein it is stated that "a report under Sub-section (3) of Section 3 of the said Act, to the Government of Maharashtra on 1.10.2003. The State Government was pleased to approve the Order of Detention on 8.10.2003 and was further pleased to confirm the said Order of Detention on 8.10.2004." Apparently, there are two contradictory statements regarding the date of submission of the order to the State Government by the detaining authority under Section 3(3) of the MPDA Act as well as the date of approval of the order by the Government. The learned APP has also produced the records in that regard, and perusal thereof evidently discloses that the report was submitted on 1st October, 2003 and the approval was granted by the Government on 10th October, 2003. Obviously, therefore, the statement made by Shri Satish Narayan Pawaskar, Under Secretary, Home Department (Special), Government of Maharashtra, Mantralaya, Mumbai, to the effect that the date of receipt of the report to be 1st October, 2004 and the approval thereof by the Government to be on 8th October, 2004 is not correct.

13. The Section 3(3) of the MPDA Act clearly requires the detaining authority who has been delegated powers under Section 3(2) of the MPDA Act to forward the order within 12 days after making thereof to the State Government for approval by the law. Being so, the date in relation to the issuance of the order, submission and approval by the Government assume great importance while considering the issue regarding compliance of the procedure prescribed under the MPDA Act. Being so, the authorities filing affidavits are certainly expected to disclose true and correct facts with utmost sense of responsibility. The Deponent Shri Satish Narayan Pawaskar, Under Secretary, Home Department (Special), Government of Maharashtra, Mantralaya, Mumbai, apparently did not take necessary precaution in disclosing the true facts pertaining to the dates of submission of the report and the approval by the Government in relation to the detention order. In fact, this is not the first time that we have come across incorrect statement in the affidavit of Shri Satish Narayan Pawaskar. He had filed the affidavits in other detention petitions also and in some of those affidavits, we have noticed such incorrect statements. Though the attempt is made by the learned APP to contend that the said statements

were on account of typing mistake, such an explanation by the learned APP in relation to the affidavits filed by the Government Officers cannot be accepted. The affidavit is a statement of fact by the Deponent and in order to have sanctity to the statement of fact, the affidavits are required to be verified before the officer authorised to administer the oath. Undoubtedly, these affidavits are affirmed on oath by Shri Satish Narayan Pawaskar, Under Secretary, Home Department (Special), Mantralaya, Mumbai. It is also to be noted that an incorrect statement can mislead the Court as also amount to a false statement in which case, the Deponent can invite proceedings for contempt of Court as was held by the Apex Court in **Hiralal Chawala & Anr. v. State of U.P. & Ors.,** reported in (1990) 2 SCC 143 as well as in **U.P.Res.Emp.Co-op. House B. Society & Ors. v. New Okhla Indus. Deve. Authority & Anr.,** reported in AIR 2003 SC 2723.

14. However, on assurance by the learned APP, at this time, that henceforth the Government officers will ensure that no such mistakes are committed in their affidavits, we refrain ourselves from issuing any direction for action in this matter against the said officer, at this time. However, henceforth, in case any such mistake comes to our notice in an

affidavit of the said officer, we will have no hesitation in taking appropriate action against the concerned officer.

15. In the result, the Petition succeeds. The order of detention of the petitioner-detenu is hereby quashed and set aside. The Respondents are directed to release the petitioner-detenu forthwith unless required in any other matter. The rule is made absolute accordingly with no order as to costs.

(R.M.S.Khandeparkar, J)

(P.V.Kakade, J)